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IN THE
SUPREME COURT OF THE UNITED STATES

PAUL COX,

Petitioner,

against

DAVID MILLER, SUPERINTENDENT,
EASTERN CORRECTIONAL FACILITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Pursuant to the Revised Rules of this Court, Rule 15, the respondent submits this brief in opposition to the captioned petition for a Writ of Certiorari.

FACTS

In the early morning hours of December 31, 1988, as Drs. Shanta Chervu and Lakshman Chervu lay sleeping in their bedroom in their own home, twenty-one year old Paul Cox broke into their house, took a knife from their kitchen, and butchered them.

The lifeless bodies of Shanta and Lakshman Chervu were discovered two days later; both had multiple stab wounds and slit throats. Numerous bloodstains were found including a partial handprint – in the blood of Lakshman – on one of the pillowcases of the bed. One of the sheets and the comforter

had similar prints, indicative of a person with bloody hands placing his hand flat on the fabric. In addition, on the inner door jamb leading from the mudroom to the living room was a reddish-brown bloodstain, consistent with someone placing a cut finger on the jamb.

There were no leads to who had committed these crimes for almost four and one-half years. Then, in May of 1993, Ms. H, a member of Alcoholics Anonymous (A.A.), related to the police that petitioner, also a member of A.A., told her he was responsible for the murders, that he had thought at the time he was killing his parents, and that he had gone back to the house the day after the murder with cleaning supplies and cleaned up. It turned out that Ms. H was at least the seventh A.A. member with whom the petitioner had discussed his commission of the murders between 1991 and 1993.

The petitioner had joined A.A. in November 1990 and regularly attended meetings thereafter. After an A.A. meeting one night in late 1990 or early 1991, according to his own trial testimony, petitioner went to his girlfriend Jessica's house and told her about the crimes. Jessica suggested he telephone his A.A. sponsor, Mr. C, and tell him about it, which he did. Mr. C advised the petitioner to turn himself in.

Thereafter, petitioner met several times with an attorney – his eventual trial counsel – who (according to petitioner's trial testimony) advised him to stay in A.A., to get into, and stay in, therapy and not to talk to anyone else about it, to keep his mouth shut.

But petitioner could not keep his mouth shut. Instead, he privately told Mr. A about the crimes when both were at an A.A. meeting. He did the same with Mr. S.

Mr. R, who was a member of a different A.A. group than petitioner, became petitioner's roommate in an apartment in Rye in the fall of 1991 or 1992. While they were living together, the petitioner told him about his commission of the crimes on three separate occasions. Petitioner, in his own trial

testimony, described these conversations as follows:

> I mean lots of times he would bring up things, you know, he was trying to figure things out, you know? Whether it be – I mean one time he asked me because he had known I had been in the air force previously and, you know, was fingerprinted for previous jobs and he would ask me well, you know, if you did this how come your fingerprints aren't there? You know your fingerprints are on file. Don't you think they would have caught up with you already? And we would throw around ideas, like well it is December, January, it's cold, we could be wearing gloves. There's a possibility that I might have wiped the place down. I mean we were just trying to find any kind of rationale to what we were discussing. I mean we discussed, I mean what would have happened, I mean with the knife, what would have happened with the clothes. I mean we were constantly talking about it and throwing things back and forth. Trial transcript, pp. 1847-1848.

Later, the petitioner and Mr. R moved to New Rochelle and, in February 1993, acquired another roommate, Ms. H, also an A.A. member. Before Ms. H moved in with the petitioner and Mr. R, she met alone with the petitioner in the Rye apartment he shared with Mr. R. The petitioner told Ms. H there was something he needed to tell her if she was going to be his roommate. He told her that he had been waking up with nightmares in which he was piecing together a night when he had murdered a couple in Larchmont by breaking into their house, taking a knife from the kitchen and stabbing them as they slept. He told her that he had been drunk at the time and thought he was killing his parents. The petitioner said he had had a blackout, but it was now coming back to him in bits and pieces and he was scared. He also said he had gotten rid of the knife, and gone back the next day with cleaning supplies and cleaned up. Ms. H was numbed by the news; nevertheless, she did move into the New Rochelle apartment with the petitioner

and Mr. R and remained about two months, until she became ill and moved back home with her parents.

As mentioned above, it was Ms. H who told police that the petitioner had told her he committed the murders. Based upon the information provided by Ms. H, the petitioner was arrested, his fingerprints taken and they matched those at the scene. The petitioner said his first reaction to his arrest was relief that the turmoil was finally over.

Prior to petitioner's trial on two counts of murder in the second degree, his attorney requested a hearing to determine whether the petitioner's statements to other A.A. members were privileged on the grounds that the statements were made "in reliance upon the historical and necessary blanket of confidentiality which involves the free sharing and communication of issues among A.A. members." No law was cited for this proposition, neither cases, nor statutes, nor constitutional provisions; nor was the New York clergy privilege, N.Y. Civ. Prac. § [hereafter, "CPLR"] 4505, or any religious consideration cited. In response to the prosecutor's answer that there was no recognized legal predicate for such a privilege, petitioner, while acknowledging that there was no statutory authority for his position, replied that the privilege should be created by the trial court in furtherance of public policy, and that a hearing was necessary to demonstrate that need. Finding no legal basis for a new court-created privilege, the court did not order a hearing.

At no time was petitioner precluded from presenting any evidence regarding the nature of his conversations with fellow A.A. members. Indeed, petitioner testified extensively on this subject. His first trial ended in a hung jury. At his second trial, there was testimony that one of the basic principles of A.A. is "anonymity." Mr. O acknowledged that this was not legal confidentiality.

As petitioner testified that he committed the crimes while drunk – he claimed he had blacked out the incident and only later it came back to him, at first in dreams, and he felt

miserable that he had committed the crimes – the jury, determining first that Cox committed intentional murder beyond a reasonable doubt, N.Y. Crim. Jury Instructions, Penal Law § 125.25(1), p. 207, but then finding by a preponderance of the evidence that the crime was committed under an extreme emotional disturbance, N.Y. Penal Law § 125.25(1)(a), convicted the petitioner of two counts of manslaughter in the first degree instead of murder in the second degree. He was sentenced to serve two consecutive terms of imprisonment, each of 8⅓ to 25 years.

On appeal to the Appellate Division, the petitioner shifted from claiming that the trial court should have created a brand new, never-before-known privilege, to claiming for the first time that the New York clergy privilege statute, CPLR 4505, should be interpreted as a matter of sound state policy to incorporate A.A. communications, arguing that both state and federal courts had already found significant religious activity in the A.A. program. This claim had never been made to the trial court. Furthermore, there was no claim that any particular construction of the state statutory privilege was compelled by the First Amendment, that CPLR 4505 was unconstitutional, or that CPLR 4505 would be unconstitutional if an A.A. privilege was not read into it. No federal cases were cited that stood for any such proposition and no United States Supreme Court cases were cited at all.

The Appellate Division, in its decision affirming the conviction, found these issues to be "unpreserved for appellate review or without merit." *People v. Cox*, 264 A.D.2d 854. The issues were presented in the same manner in an abbreviated fashion in his application seeking leave to appeal to the New York Court of Appeals, which denied leave. *People v. Cox*, 94 N.Y.2d 902.

On May 3, 2001, petitioner filed a petition for a Writ of Habeas Corpus on the grounds, *inter alia*, that New York's failure to bar the admission of statements he made to fellow Alcoholics Anonymous (A.A.) members under various

circumstances, as privileged communications to members of the clergy under CPLR 4505, violated his rights under the First and Fourteenth Amendments. On July 30, 2001, the District Court issued a memorandum and order granting petitioner's petition, holding that the state court's implicit determination that the A.A. statements were not privileged under CPLR 4505 rendered the statute unconstitutional as applied, in violation of the First Amendment; in addition, the District Court held that the evidence introduced at petitioner's state trial that his fingerprints and palmprint matched bloody finger- and palmprints found at the homicide scene, was derived from the A.A. statements and therefore "fruit of the poison tree."

In its appeal to the United States Court of Appeals for the Second Circuit, the prosecutor argued: (1) that the District Court incorrectly determined that petitioner's federal claims had been exhausted in the state courts as required by 28 U.S.C. § 2254(b) as the issue actually decided by the District Court, the constitutionality of CPLR 4505 (as opposed to the state court's statutory interpretation of CPLR 4505), was not presented to any New York state court; (2) that the District Court ignored the 28 U.S.C. § 2254(d)(1) requirement that the federal constitutional issue under consideration first must be "clearly established Federal law, as determined by the Supreme Court of the United States" before it may serve as the basis for a 28 U.S.C. § 2254 Writ of Habeas Corpus, as here such a Writ was granted upon an issue the Supreme Court never has been asked to consider; and (3) that New York's clergy privilege statute, CPLR 4505, is a constitutionally permissible accommodation to the religious practices of members of the clergy which has been modified over time to ensure both its equal applicability to clergy members from every religion and its indifference to the tenets of any religion. When considered in conjunction with New York's other professional privileges, New York treats confidential conversations with religious professionals for spiritual advice and services equivalently to confidential

conversations conducted with comparable secular professionals for secular advice and services.

The prosecutor also argued that New York law permissibly limits the scope of its evidentiary privileges (except the spousal privilege) to communications necessary for individuals to obtain certain professional advice or services. The First Amendment does not mandate that New York lawmakers extend the state's privilege statutes to non-professionals untutored in rendering specialized services. Moreover, the literature and policies of Alcoholics Anonymous refutes the suggestion that A.A. regards itself as a religion, regards its members as equivalent to members of the clergy, or considers an A.A. member's admissions to a fellow A.A. member to have any special legal status.

Finally, the prosecutor argued that the District Court's application of the exclusionary rule's "fruit of the poisonous tree" doctrine to an evidentiary statute proscribing the disclosure of privileged communications – an issue also neither exhausted before the state courts nor the subject of any Supreme Court precedent – was in error. The exclusionary rule applies to the "fruits" of unlawful police conduct, not the case when a witness voluntarily discloses to police another person's admission to having committed a homicide. In addition, the "fruits" in question were obtained by police prior to anyone claiming that any privilege existed, a necessary element to the existence of any New York evidentiary privilege. In contrast, the "fruit of the poisonous tree" doctrine requires that the tree must be poisoned before the fruit appears.

On July 17, 2002, the United States Court of Appeals issued its decision. While concluding that petitioner's state appellate brief "focused primarily on persuading the Appellate Division of the policy rationales for extending New York's cleric-congregant privilege to A.A.," petitioner's appendix, p. 31a, the court held that his presentation was sufficient to alert the state court to a First Amendment issue. The court also elected

not to reach the issue of the application of 28 U.S.C. § 2254(d)(1) to this case, given that it would not alter its ultimate conclusion.

On the merits, the court held that it was not necessary to resolve the question of whether the First and Fourteenth Amendments require New York to extend its clergy privilege statute to conversations with lay members of Alcoholics Anonymous, as petitioner failed to carry his burden of establishing the additional requirement of CPL 4505 – not challenged by petitioner as unconstitutional – that the communications be "in confidence and for the purpose of obtaining spiritual guidance." *People v. Carmona*, 82 N.Y.2d 603, 609.[1]

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[1] In his petition for certiorari, petitioner persists in the perverse notion that with one sentence in the *Carmona* decision – "Despite the concurrence's 'four canon' analysis, New York's test for the privilege's applicability distills to a single inquiry: whether the communication in question was made in confidence and for the purpose of obtaining spiritual guidance." *People v. Carmona*, 82 N.Y.2d 603, 609 – the New York Court of Appeals, without any analysis, discussion or even direct declaration, eliminated from CPLR 4505 the express requirement that the communication be made to "a clergyman, or other minister of any religion or duly accredited Christian Science practitioner … in his professional character." Suffice it to say that: (1) no New York court has ever read *Carmona* to so hold; (2) it was undisputed in *Carmona* that the conversations were to two ministers; and (3) the disagreement in *Carmona* between the majority and the concurrence involved only whether the privilege was nullified in that case by the defendant repeating the content of his clergy confession thereafter to third parties.

POINT I

The petitioner was accorded a full and fair opportunity to present evidence relating to the nature and purpose of his conversations with fellow A.A. members.

Confronted with a Court of Appeals decision that rejected his assertion of a clergy privilege – even when accepting, at least for the sake of argument, his various federal claims – because petitioner failed to establish factually even those elements of the privilege with which he took no legal issue, petitioner now raises a new contention: that the courts below denied him an adequate opportunity to present evidence in support of his claim.

Petitioner's argument in this regard is, by necessity, carefully worded. He does not claim that any court precluded him from introducing any evidence he sought to adduce regarding the purposes of his conversations with fellow A.A. members. Rather, he states that "[a]ny proof on this issue which Petitioner *might have attempted to offer* at trial ... *would have been* inadmissible." Petition, p. 13 [emphasis added].

Petitioner is loathe to make any prediction as to what the trial court would have, or would not have, allowed into evidence regarding the clergy privilege – or register any complaint at this stage along these lines – as he failed to make any reference to the clergy privilege, in any fashion, during any pretrial or trial proceedings in state court.

Nonetheless, the record below establishes conclusively that, contrary to petitioner's claim that these issues were "neither material nor relevant," petition, p. 13, various trial witnesses – most particularly, the petitioner himself – testified extensively about the nature and purpose of petitioner's conversations with the numerous friends and roommates who gave evidence

against him, testimony which more than amply supports the Court of Appeals' determination.

Petitioner's lengthy description, given at trial, of his regular gab sessions with his roommate, Mr. R – in which they "were constantly talking about it and throwing things back and forth," with Mr, R "trying to figure things out": "how come your fingerprints aren't there ... what would have happened, I mean with the knife, what would have happened with the clothes" – already has been quoted in full. FACTS, p. 3, *supra*. Petitioner similarly gave a detailed description of his reasons for discussing his past with Mr. A:

> [W]e had gotten a friendship going along and he was someone I could talk to and he was someone who talked openly about his gang involvement out in Oakland, California where he used to live, and he had, you know, told me that he had taken place in driveby shootings and he was someone who I felt possibly could identify with what I was going through about not knowing if you had actually killed someone but thinking that you might. Trial transcript, pp. 1849-1850.

According to Ms. H's testimony, the purpose of her conversation with petitioner was: "he told me there was something he needed to tell me if I was to be his roommate." Trial transcript, p. 717.

Indeed, more generally, Mr. C testified as to whether A.A. is a religious organization, trial transcript, p. 451, while petitioner's attorney questioned Mr. O without objection or interruption about the nature of A.A. confidentiality and anonymity. Trial transcript, p. 487-488.

Thus, it is apparent from the record that no restrictions were placed upon petitioner's ability to adduce proof of why he engaged in these various conversations. If any evidence on this subject was not elicited, it is only because petitioner elected not to elicit it.

As an alternative, petitioner expands his original First Amendment argument to attack, for the first time, the element of the New York clergy privilege requiring that confidential clergy conversations be "for the purpose of obtaining spiritual guidance." The First Amendment obligation of neutrality among religions, he maintains, is violated unless A.A.'s own definition of "spiritual guidance" controls for these purposes, which definition he proposed to supply while, at the same time, forbidding a court to question its veracity.

A federal appellate court already has rejected the view that an organization can shield its internal communications under a clergy privilege statute by: declaring itself a religion; declaring all of its members clergy; and decreeing all of its conversations to be for spiritual advice. *In re Grand Jury Investigation*, 918 F.2d 374, 384 n. 13. Any other holding would serve as a veritable roadmap to enterprises engaged in illegal activities, such as an organized crime family seeking to silence a government informant.

Moreover, this Court has stated that "[a]lthough a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. *Wisconsin v. Yoder*, 406 U.S. 205, 215-216.

Nonetheless, before such a constitutional question is even ripe for consideration, it should be the *organization* that makes these various declarations, not one individual organization member seeking to evade a judgment of conviction on double manslaughter charges.

Petitioner has never made any showing that Alcoholics Anonymous or its membership seeks the status he would prescribe for it for his own purposes. The A.A. literature placed in the record below by petitioner reflects that Alcoholics Anonymous considers itself a "lay organization," *44 Questions*, A.A. General Service Conference-approved

literature, p. 35, and "not a religious society, since it requires no definite religious belief as a condition of membership." *Id.*, at p. 19. Its publication *Twelve Steps and Twelve Traditions* refutes the argument that A.A. regards its members as *de facto* ministers by describing "your clergyman" as "someone entirely outside of A.A." *Twelve Steps and Twelve Traditions*, Alcoholics Anonymous World Services, Inc. p. 61. The only trial evidence adduced along these lines attests to the fact that A.A. "is not a religious organization" and "is not affiliated with any organized, specific religion." Trial transcript, p. 451. Petitioner should not be heard to demand for A.A. a legal sanctuary which A.A. does not demand for itself, in order to secure a personal goal that the organization does not share.

In other words, at a minimum, some effort by the organization to assume religious status should be required before the issues raised need even be discussed.

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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